IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

WA.No. 675 of 2007()

AGAINST THE JUDGEMENT IN WPC.39170/2003
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APPELLANT: 1ST RESPONDENT IN WP(C)

G.K.OMANAKUTTAN NAIR, U.D.CLERK,
ATHURASRAMAM N.S.S.HOMOEO MEDICAL COLLEGE,
S.PURAM POST, KOTTAYAM.

BY ADV. SRI.K.SHRIHARI RAO

RESPONDENTS: PETITIONER/RESPONDENTS IN WP(C)
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1. P.N.SARALA BAI, HEAD CLERK,
ATHURASRAMAM N.S.S.HOMOEO MEDICAL COLLEGE,
S.PURAM, KOTTAYAM DISTRICT,
RESIDING AT KIZHAKEDATHU BUNGLOW,
KIZHAKEDATHIL LANE, THIRUNAKKARA,
KOTTAYAM DISTRICT.

2. THE PRINCIPAL AND THE CONTROLLING
OFFICER, GOVERNMENT HOMOEOPATHIC MEDICAL COLLEGE,
IRANIMUTTOM, MANACAUD P.O., TRIVANDRUM.

3. THE CHAIRMAN,
ATHURASRAMAM N.S.S.HOMOEO MEDICAL COLLEGE,
GOVERNING BODY, N.S.S.HEAD OFFICE, PERUNNAI POST,
CHANGANACHERRY, KOTTAYAM DISTRICT.

4. P.G.KRISHNAKUMARI,
U.D.CLERK, AUTHUTRASRAMOM
N.S.S.HOMEO MEDICAL COLLEGE,
S.PURAM POST, KOTTAYAM DISTRICT.

5. THE MAHATMA GANDHI UNIVERSITY,
APPELLATE TRIBUNAL, TRIVANDRUM,
REPRESENTED BY ITS SECRETARY.

BY ADV. SRI.K.GOPALAKRISHNA KURUP FOR R1
GOVERNMENT PLEADER SHRI. BENNY GERVASIS FOR R2
SRI.P.GOPAL

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 22/03/2007, THE COURT ON 10/4/2007 DELIVERED THE FOLLOWING:

P.R. Raman & Antony Dominic, JJ.
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W.A.No.675 of 2007
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Dated this the 10th day of April, 2007.

JUDGMENT

Antony Dominic,J.

First respondent in W.P(C).No.39170 of 2003 is the appellant. First respondent herein had filed the Writ Petition, seeking to quash Ext.P12 order of the fifth respondent and to declare that Exts.P2, P3, P4 and P5 are valid and to permit her to continue in the post of Head Clerk in the third respondent's College. The Writ Petition having been allowed by a learned single judge of this Court, the first respondent in the Writ Petition, has filed this appeal.

2. Briefly stated, the facts, which led to the filing of the Writ Petition, are that the third respondent – Management originally had two Colleges imparting instruction in the course of diploma in Homeopathic Medicines and Surgery and degree in Homeopathic Medicines and Surgery. The appellant joined in the Diploma College as L.D. Clerk on 3.11.1983 and the first respondent herein joined as Clerk-cum-Typist in the Degree College on 23.2.1983. Following the closure of the Diploma College, by Ext.P6 order dated 30.1.1994, all

the staff in the Diploma College were absorbed in the Degree College with effect from 1.1.1994. Subsequently, on 10.11.1995, the Government of Kerala issued Ext.P7 order introducing direct payment system to the staff of the Degree College, with effect from 1.11.1995. Thereafter, the Government issued Ext.P8 order dated 12.8.1997 approving the non-teaching staff pattern in the Degree College, for the purpose of direct payment.

3. In the meanwhile, Ext.R3(b) was issued by the Government of Kerala on 31st May, 1990 ordering that a Clerk-cum-Typist or a Typist-Clerk, who has acquired five years of service in the respective unit, will be allowed category change as Clerk or Typist as the case may be within the unit, and that his promotion as U.D. Clerk or U.D. Typist will be on the basis of his seniority in the list of L.D. Clerk or L.D. Typist with reference to his original appointment as Clerk-Typist or Typist-Clerk. It was clarified that he will not lose his seniority for promotion as U.D. Clerk or U.D. Typist on account of the category change. Subsequently, the first respondent exercised her option for category change as L.D. Clerk on 5.1.1998. Although Ext.R3(b) did not contemplate acceptance by the Controlling Officer of any such option for category change, it is stated that the first respondent's option was accepted with effect from 10.1.1998.

4. Subsequent to this, by Ext.P2 order dated 12.7.1999, the first respondent, fourth respondent and the appellant were promoted as U.D. Clerks. A reference to Ext.P2 would show that this was issued in pursuance to Ext.P8 order issued by the Government of Kerala sanctioning the staff pattern of the third respondent's College and Annexure to Ext.P8 contains the posts that are thus sanctioned. It is to be noted from Annexure II to Ext.P8 that it does not contain the post of U.D. Clerk. Ext.P2 also shows that the ratio between the L.D. Clerk and the U.D. Clerk in the College was 1:1 and that it is on that basis that three seniors qualified L.D. Clerks including the appellant, first respondent and the fourth respondent were ordered to be so promoted. However, as stated, there were only 5 L.D. Clerks and applying the ratio of 1:1, only two of them could be promoted as U.D. Clerks and the promotion of the appellant ordered by Ext.P2 alone was not approved by the Principal and the Controlling Officer as per Ext.P3 order dated 13.2.2000. Subsequent to this, by Ext.P4 order dated 9.6.2001, the first respondent was further promoted as Head Clerk and this promotion was also approved by the Controlling Officer as per Ext.P5.

5. At that stage, the appellant filed an appeal before the fifth respondent Tribunal contending that it was on 12.8.1997 when Ext.P9

was issued that the vacancy of U.D. Clerks arose and that as on that date, the first respondent was only a Clerk-cum-Typist and not a L.D. Clerk, the feeder category post of U.D. Clerk and hence, he was ineligible as on the date of occurrence of vacancy. The fifth respondent - Tribunal held that the vacancies of U.D. Clerks arose on 12.8.1997 and that since the first respondent was only a Clerk-cum-Typist then, he was not in the feeder category and was not eligible to be promoted. On this basis, the third respondent – Management was directed to re-arrange the promotion treating the appellant as senior. This order, being Ext.P12, was challenged by the first respondent by filing Writ Petition. The learned single Judge by judgment dated 24.11.2006 held that the date of Ext.P2, namely, 12.7.1999, was the date of occurrence of vacancies of U.D. Clerk and since as on that date, the first respondent had exercised her option as L.D. Clerk, she was in the feeder category and was eligible to be promoted. On this basis, the learned single Judge quashed Ext.P12 order of the Tribunal and allowed the Writ Petition. It is aggrieved by the said judgment, the appellant, who was the first respondent in the Writ Petition, has come up with this appeal.

6. We have heard counsel for the appellant, first respondent and the third respondent and considered the arguments.

7. The submission of the counsel for the appellant was that vacancy arose on 1.11.1995, the date on which the direct payment system was introduced or on 12.7.1997 when the Government issued Ext.P8 order approving the staff pattern of the non-teaching staff of the third respondent - College. According to him, if either of these dates are taken as the date of occurrence of vacancies, the first respondent was only a Clerk-Typist as on those dates and if that be so, the first respondent could not have been promoted as he was not in the feeder category. On the other hand, counsel for the first respondent, who is also supported by the third respondent, would argue that in view of Ext.R3(b), he had opted to become L.D. Clerk and that on such category change, he is entitled to be treated as L.D. Clerk with effect from the date when he entered the service of the third respondent's College. According to him, irrespective of the date of occurrence of vacancy, he having exercised his option, he is entitled to be promoted to the post of U.D. Clerk, which has been done by the third respondent by Ext.P2. He would also contend that at any rate, date of occurrence of vacancy can only be the date of Ext.P2, viz., 2.7.999 and on that date he was a L.D.Clerk, having exercised option on 5.1.1998.

8. Considering the rival submissions of the counsel for the

parties, we are of the view that the appellant is not entitled to succeed in this Writ Appeal. We say that for the reason that it was by Ext.P7 order dated 10.11.1995 direct payment system was introduced in the third respondent's College with effect from 1.11.1995. Ext.P8 order issued by the Government, approving the staff pattern of the non-teaching staff, does not say that there was any post of U.D. Clerk in the College. If that be so, we cannot accept the position canvassed by the counsel for the appellant that the vacancy is to be deemed to have arisen on 1.11.1995. Similarly, the date of Ext.P8 canvassed by the counsel for the appellant also cannot be accepted for the same reason.

9. On the other hand, Ext.P2 is the order issued by the College for the first time adopting 1:1 ratio between L.D. Clerk and U.D. Clerk and making promotions on that basis. From the materials available before us, it is the only piece of evidence indicating the date of occurrence of vacancy of U.D. Clerk and that date we have to assume is 12.7.1999 and the first respondent was qualified, as on that date. This is for the reason that on the strength of Ext.R3(b) or otherwise, he had exercised his option for category change, by virtue of the option exercised by him on 5.1.1998. Having exercised his option, which is also seen to have been accepted on 10.1.1998 at any rate, he had become L.D. Clerk as on that date. If that be so, he was entitled

to be considered for the post of U.D. Clerk on 12.7.1999. Adopting this reasoning, we cannot find fault with the view taken by the learned single Judge. However, we are not impressed by the argument of the counsel for the first respondent that in view of Ext.R3(b), his client was entitled to be treated as a L.D. Clerk irrespective of any option exercised by her. According to us, to avail of the benefit of Ext.R3(b), one has to opt for a category change and once such option is exercised, category change will be allowed with effect from the date of entry into service. This being the purport of Ext.R3(b), the first respondent could claim to be a L.D. Clerk only after 5.1.1998, though she will have to her credit the prior service also.

10. Counsel for the appellant submitted that irrespective of his claim as against the first respondent, his client was entitled to have been promoted as U.D. Clerk along with the first respondent and that the Controlling Officer ought not have declined approval to his promotion as has done by Ext.P3. On going through the pleadings in this case, we find that the appellant has not set up such a case before the Tribunal or learned single Judge and this argument is without any supporting material, since the controversy raised was confined to the validity or otherwise of Ext.P12 order issued by the fifth respondent. The argument now raised by the appellant has not been considered by

any of the Authorities. In the circumstances, we can only clarify that the appellant will be at liberty to pursue any such claims independently and that the findings in this judgment will not stand in the way.

With the above observations, this Writ Appeal will stand dismissed, but without any order as to costs.

P.R.Raman,
Judge.

Antony Dominic
Judge.

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